SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 653

THE UNITED STATES OF AMERICA, PETITIONER

vs.

O. B. FISH

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

INDEX

35849—25——1

In United States Court of Customs Appeals

O. B. FISH
vs.
THE UNITED STATES } No. 2266

Petition for review

To the Honorable the United States
Court of Customs Appeals:

Your petitioner, having complied with the statutes in such case made and provided, and being dissatisfied with the decision of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, respectfully prays that the said Court of Customs Appeals review the questions of law and fact involved in said decision, and for that purpose prays that an order be entered requiring the said Board of Appraisers to return to said Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decision thereon. And your petitioner also prays for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

The particulars of the errors of law and fact involved in said decision of said Board of Appraisers of which your petitioner complains are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, April 5, 1923.

O. B. FISH,
Petitioner,
By ALLAN R. BROWN,
Attorney, 1 Broadway, New York City.

2 Schedule A

The following are the importations and entries covered by this proceeding, with the approximate dates thereof, and with such other data as are convenient for purposes of identification:

Invoice No.	Entry No.	Vessel	Date of entry	No. of petition	Date of decision
1	774653	Parcel Post	11/ 9/22	305–R	3/20/23
	776484	Parcel Post	11/11/22	305–R	3/20/23
2	774653	Parcel Post	11/ 9/22	304–R	3/20/23

Assignment of errors

Schedule B

The Board of United States General Appraisers has denied the petitions filed under section 489 of the Tariff Act of 1922, covering the entries enumerated in Schedule A, thereby making errors of law and fact by failing to find, or finding the contrary of, the following propositions:

1. The entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.

2. The fact that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise is manifest from the face of the papers without any testimony.

3. Said fact is established by the testimony.

4. The testimony of the custom house broker is not necessary to establish said fact.

5. The testimony of the custom house broker is not competent nor material to the establishment of said fact.

6. The custom house broker was not the only actor in the case.

7. The custom house broker was not an actor in the case.

8. The custom house broker was not the only man who could testify to the facts attending the entry specified in section 489.

3 9. The custom house broker could not testify to the facts attending the entry specified in section 489.

10. The custom house broker did not make the entry within the meaning of the statute.

11. The importer made the entry within the meaning of the statute.

12. The petitions should be granted.

Endorsed: United States Court of Customs Appeals. Filed Apr. 5, 1923. Arthur B. Shelton, Clerk.

Return of board to order of court

Board of United States General Appraisers

O. B. FISH, *Appellant*
vs. Suit No. 2266
UNITED STATES, *Appellee*

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General

Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of

1. Petitions 304–R and 305–R and the letters of the collector of customs transmitting the same.
2. The testimony taken before the Board.
3. The Board's decision in question, Abstract 45757, and judgment order.

The entry papers will be forwarded later.

4 Witness the Honorable Jerry B. Sullivan, President of the Board, this third day of May, A. D. 1923.

[SEAL.]

D. P. DUTCHER,
Chief Clerk.

G. V. O.

Remission of Additional Duties.

Petition of 304–R

Before the Board of United States General Appraisers

In the Matter of Entry 774653, Parcel Post, Nov. 9, 1922, of O. B. FISH

Petition for Remission of Additional Duties under Section 489 of Title IV of the Tariff Act of 1922

Petition is hereby made under section 489 of title IV of the Tariff Act of 1922 for a finding of the Board of Appraisers and the remission or refund of the additional duties (so-called penal duties) on the following entry of O. B. Fish:

Entry No.	Vessel	Date of entry	Reappraisement No.
774653	Parcel Post	11/9/22	12120–A

The decision of the Board of Appraisers was on Jan. 23, 1923. The entry has not yet been liquidated. The entry of the merchandise at a less value than that returned upon final appraisement was

done without any intent to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The importer entered the merchandise for duty upon the basis of the price paid by him and thought that this was the correct value.

The offer is hereby made to furnish further proof to the Board of United States General Appraisers, upon reasonable notice from them, of the facts involved, and in support of the contentions, herein.

A copy of this petition has been served upon the collector of customs and upon the Assistant Attorney General.

Respectfully submitted,

STRAUSS & HEDGES,
Attorneys for Importer.

5 *Affidavit*

304–R

STATE OF NEW YORK,
City and County of New York, ss:

O. B. Fish, being duly sworn, deposes and says: I am the importer in the above petition, doing business at 64 East 11th Street, New York City. I have read said petition and am familiar with the transaction and the facts stated in the petition are true to the best of my knowledge and belief.

O. B. FISH.

Sworn to before me this 25th day of January, 1923.

[SEAL] E. L. BLAUVELT,
Notary Public, Rockland County.

Board of U. S. General Appraisers. Received Jan. 29, 1923. D. P. Dutcher, Chief Clerk.

Copy received Jan. 29, 1923. Assistant Attorney General.

Report of the collector

304–R

Treasury Department

United States Customs Service

NEW YORK, N. J., Jan. 29, 1923.

Office of the Collector, District No. 10

To the Board of U. S. General Appraisers, New York.

GENTLEMEN:

A copy of an application for remission of additional duties accruing under section 489 of the Tariff Act of 1922 having been filed in

this office covering the importation named hereinafter; the papers are forwarded to your office herewith. (T. D.s. 39312 and 39336.)

Respectfully,

H. C. STUART,
Acting Collector.
J. J. M.

Importer	Entry No.	Date	Vessel
O. B. Fish	774653 Inv. #1	11/10/22	P. Post.

6 Entry for enclosed invoice to the Board on previous application with invoice #2. J. J. M.

Rec'd Jan. 29, 1923. B'd Gen'l Apprs.

Petition 305–R

Before the Board of United States General Appraisers

In the Matter of Entry 774653, Parcel Post, Nov. 9, 1922, etc., of O. B. FISH

Petition for Remission of Additional Duties under Section 489 of Title IV of the Tariff Act of 1922

Petition is hereby made under section 489 of title IV of the Tariff Act of 1922 for a finding of the Board of Appraisers and the remission or refund of the additional duties (so-called penal duties) on the following entries of O. B. Fish:

Entry No.	Vessel	Date of entry	Reappraisement No.
774653	Parcel Post	11/ 9/22	11885–A
776484	Parcel Post	11/11/22	11884–A

The decision of the Board of Appraisers was on Jan. 11, 1923. The entries have not yet been liquidated. The entry of the merchandise at a less value than that returned upon final appraisement was done without any intent to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The importer entered the merchandise for duty upon the basis of the price paid by him, and thought that this was the correct value.

The offer is hereby made to furnish further proof to the Board of United States General Appraisers, upon reasonable notice from them, of the facts involved, and in support of the contentions, herein.

A copy of this petition has been served upon the collector of customs and upon the Assistant Attorney General.

Respectfully submitted,

STRAUSS & HEDGES,
Attorneys for Importer.

7 *Affidavit*

305–R

STATE OF NEW YORK,
City and County of New York, ss:

O. B. Fish, being duly sworn, deposes and says: I am the importer in the above petition doing business at 64 East 11th Street New York City. I have read said petition and am familiar with the transactions and the facts stated in the petition are true to the best of my knowledge and belief.

O. B. FISH.

Sworn to before me this 25th day of January, 1923.

[SEAL] E. L. BLAUVELT,
Notary Public, Rockland County.

Board of U. S. General Appraisers. Received Jan. 29, 1923. D. P. Dutcher, Chief Clerk.

Copy received Jan. 29, 1923. Assistant Attorney General.

Report of the collector

305–R

Treasury Department

United States Customs Service

NEW YORK, N. Y., Jan. 29, 1923.

Office of the Collector, District No. 10

To the Board of U. S. General Appraisers, New York, N. Y.

GENTLEMEN:

A copy of an application for remission of additional duties accruing under section 489 of the Tariff Act of 1922 having been filed in this office covering the importations named hereinafter, the papers are forwarded to your office herewith. (T. Ds. 39312 and 39336.)

Respectfully,

H. C. STUART,
Acting Collector.
J. J. M.

8 Importer	Entry No.	Date	Vessel
O. B. Fish------	774653 Inv. #2 (One application.)	11/10/22	P. Post.
" ------	776484	11/13/22	"

Rec'd Jan. 29, 1923. B'd Gen'l Apprs.

Proceedings before the board

The U. S. General Appraisers

In the Matter of the Application of O. B. FISH for the Remission of Additional Duties

Nos. 304–R and 305–R

NEW YORK, February 15, 1923.

Present:
General Appraiser WAITE, Chairman.
General Appraiser ADAMSON.

Appearances:
Strauss & Hedges (by John F. Strauss), Counsel for the Petitioner.
Pelham St. G. Bissell, Special Attorney, for the United States.

Mr. Strauss: These two cases cover three invoices, two of which are covered by the same shipment and one of which covers another shipment. The merchandise is called peacock flues.

OSCAR B. FISH, having been duly sworn in his own behalf, testified as follows:

By Mr. Strauss:

Q. Mr. Fish, you are the importer of the merchandise covered by the three invoices embraced in these two petitions for remission of additional duties? A. Yes, sir.

Q. You are personally familiar with the merchandise? A. Yes. sir.

Q. And the facts relating to the various cases? A. Yes, sir.

9 Q. What was the merchandise which is described apparently as peacock flues? A. Peacock flues are the small feathers on the side of the stem of the peacock. These flues were stripped down in China.

Q. It was the portion of the peacock feather which has been stripped off the quill? A. Yes, sir.

Q. In what condition are they as imported, just stripe as stripped from the quill? A. They are put through a process there, a machine process or needle process.

Q. So that they were in what shape as imported? A. Well, what we call plaited.

Q. What is the principal market for these goods in China? A. Hongkong.

Q. How did you buy these goods? A. By cable.

Q. Do you keep track of the market in these goods from time to time by quotations? A. We are not concerned with the market over there except in the instances when we are trying to buy.

Q. But when you do buy you get quotations? A. Yes, sir.

Q. By cable? A. Yes, sir.

Q. And accept them by cable? A. We may make counter offers which might be accepted.

Q. These goods are invoiced in these two cases at prices of 26, 28 and 32 dollars Hongkong per pound and were entered at such prices and appraised in every instance at $32. Is this an ordinary, common article of merchandise? A. It is a new method of preparing these goods for this market for the past two years.

Q. Is there a big demand? A. At times.

Q. Is it a steady market or fluctuating market? A. A fluctuating market.

Q. Widely fluctuating—to what extent fluctuating? A. To an extent of 30 to 35 per cent in my experience.

Q. From day to day or hour to hour? A. Oh, no, not to that extent. To my experience in the past two years—well, I should say from 50 per cent; 50 per cent fluctuating.

Q. In what period of time would that take place? A. The value of these goods two years ago——

Q. We do not care about that. What we are getting at, Mr. Fish, is this: Is the market a steady one so that a quotation or purchase today would be at the same figures as those a week ago? A. Oh, no.

Q. Would a purchase today be at the same figures as yesterday or two days ago? A. Not necessarily.

Mr. Bissell: I must object to these hypothetical questions. Let us have the facts before the court in regard to what the fluctuations were.

Mr. Strauss: We are not challenging the appraised value, we submitted to the Government figures below.

Judge Waite: No, there is no question of the appraised value.
10 He has practically conceded that value. Now he is furnishing an excuse for not entering at that.

Q. You have been importing these goods for the last two years? A. I have.

Q. Are these the first shipments that have been advanced in value? A. The only shipments.

Q. The prices of 26, 28 and 32 shown on your consular invoice represent the price actually paid for the merchandise? A. Exactly.
Q. The price you contracted to pay for them? A. We paid in American dollars, they were shipped in Hongkong currency.

Judge Waite: They are invoiced in Hongkong currency.

Q. You bought c. i. f. New York? A. Yes, sir.
Q. Now will you please explain, if you know, the variation in the prices of the same goods on the same invoice? A. Purchased under different contract dates.
Q. Can you give us the dates? A. If I can refer to the bill.
Q. Any paper that you have.

Mr. Bissell: For the sake of the record we will concede that those purchased July 7, 1922, were at $26, those purchased on August 20, 1922, were at $28, and those purchased August 30, 1922, were purchased at $32.

Gen. Appr. Adamson: What I want to know in order to judge the case properly is what facts he acted on to make him believe he was entering at the proper value. That is what I want to know, what diligence he exercised to learn the facts.

Q. When these goods arrived what did you do in relation to entering the merchandise? A. Sent the papers to the customs brokers.
Q. With any instructions? A. No, sir.
Q. They entered according to the consular invoices? A. Surely.
Q. In doing that was there any intention on your part to mislead the appraiser? A. Certainly not.

Mr. Bissell: I object to the question of intent being asked. It should be shown by the acts of the individual, not by testimony as to the intent.

Judge Waite: I am not clear that the man cannot state what his intent was. His intent really is just his proceeding. I am inclined to think you can take his answer as to what his intentions were. It is not binding, of course.

Mr. Bissell: Intent in practically all cases I know of before any court always has to be shown by the acts of the individual, not by direct testimony as to what the individual intended to do.

Judge Waite: If you can show me some authority on that I would be glad to see it. I don't understand the law that way.
11 Still, I don't know that it is material here in this case where there is no jury.

Q. Did you do anything affirmitively or negatively intending to mislead him? A. Certainly not.
Q. As a matter of fact your invoices showed you the priec and the same invoices showed varying prices, did they not? A. Certainly.

Q. From your experience, Mr. Fish, please state whether or not the market value as of any particular time on this merchandise can be learned with any degree of accuracy.

Mr. Bissell: Objected to. The Board has found a market value.

Gen. Appr. Adamson: The question is what did he know about it?

A. I did not concern myself about the market value at the time. I take these invoices as they come in at the price I purchased at.

Gen. Appr. Adamson: Do you know anything about the market whatever outside of the invoice?

Witness: No, sir.

Gen. Appr. Adamson: Did you try to find out?

Witness: No, sir.

Gen. Appr. Adamson: Did you know any fact that led you to believe that the market was any higher than you paid?

Witness: No, sir.

Q. Further than that, in making the entry at the price you did, was there any intention on your part to defraud the revenue of the United States? A. Certainly not.

Q. Did you conceal or misrepresent any fact within your knowledge? A. I gave the broker the invoice and told him to make the entry.

Q. Did you intend to deceive the appraiser? A. Assuredly not.

Mr. Strauss: One of the entries gives three different prices, one of which was adopted by the appraiser, which would indicate no intent to deceive the appraiser because the highest price taken is shown on the invoice.

By Judge Waite:

Q. Peacock flues is a common commodity, I understand? A. It is becoming a common commodity.

Q. Has been for how long? A. The past two years.

Gen. Appr. Adamson: Was that highest price the last one?

Mr. Strauss: The last invoice, October 2d, was $28. The earliest shipment, September 26, was $36.

12 *Gen. Appr. Adamson:* What was the date of entry at $32, the first or last?

Mr. Strauss: The entry was by parcel post and the entries were approximately the same date, November 9 or 11.

Gen. Appr. Adamson: All made about the same date?

Mr. Strauss: Yes, sir.

Judge Waite: This invoice dated Hongkong, September 26, has got all prices on it.

Mr. Strauss: You will find another invoice——

Judge Waite: These three shipments we are speaking of here, invoiced at $26, $28, $32, all on one invoice.

Mr. Strauss: Then there is another part of it also, being an extract. Now comes this, the date of consulation of which was the second day of October later, at $28. He had an invoice at a later date at a lower price. We rest on the proposition that when we disclosed those prices, one of which is adopted, the appraiser adopts the highest of the three prices, there can be no intention of fraud because we have put before him the very highest of the prices.

Gen. Appr. Adamson: It appears here the broker made the entry not the importer.

Mr. Strauss: The broker did not make the entry in his own name. All the broker did was to prepare the papers.

By Mr. Bissell:

Q. How long have you been importing? A. About 1895.

Q. During that entire period you have been acquainted with the practice and know that the entry must be made at the home market value at the date of exportation, or as in the present instance, at the export value if it is higher? A. I have always entered my goods in the past on the invoice cost.

Q. Will you answer the question? (Question read.) A. Yes, sir.

Q. Did you make any effort to ascertain what the value was on the date of exportation of these goods? A. I did not, and if we did that we would have to cable in every instance on every entry we make.

Case submitted.

13 *Decision of the Board*

Board of United States General Appraisers

Before Board 3

March 20, 1923.

In the Matter of Petitions Nos. 304–R and 305–R of O. B. Fish for Remission of Additional Duties Imposed by the Collector of Customs at the Port of New York.

Adamson, *General Appraiser:*

In these two petitions, which were heard together, the importer seeks relief from certain additional duties. His testimony in brief was to the effect that he bought the merchandise, that he did not concern himself about the market price, that he paid the invoice price, that he sent the invoice to the broker without instructions and that the broker entered at the invoice price.

The importer was permitted to testify, over objection by counsel, that he had no intention to deceive the appraiser or defraud the Government of revenues. The writer of this opinion thinks that was error, for we determine intention from conduct described by testimony, but probably harmless error in this case because the importer did not himself make the entry and could not swear to any conduct of the broker, his agent, who made the entry, and the broker was not sworn as a witness to purge himself. Whatever conduct he committed was imputed to his principal. By purging himself of bad faith, he could have purged his principal. But as the only actor in the case and the only man who could testify to facts attending the entry was silent, there is absolutely no evidence from which we can conclude what was the intent of the person making the entry. The most that can be said about the importer was that he was very careless. Sometimes neglect is as bad in law as acts of commission.

The petitions are denied.

BYRON S. WAITE,
EUGENE G. HAY,
W. C. ADAMSON,
Board of U. S. General Appraisers.

14 *Judgment order*

At a Term of Board 3 of United States General Appraisers Held in the City of New York on the 20th Day of March, 1923

Present:
General Appraisers WAITE, HAY, ADAMSON.

Petitions Nos. 304–R, etc.

In the Matter of the Petitions of O. B. FISH for the Remission of Additional Duties

The above-entitled cause having regularly come on to be heard, and the Board, in its decision dated the 20th day of March, 1923, having determined the law and facts in favor of the Government;

It is hereby ordered, adjudged, and decreed this 20th day of March, 1923, that the petitions in this case be and the same are hereby denied.

BYRON S. WAITE,
Chairman Board 3.

[SEAL] By D. P. DUTCHER,
Chief Clerk.

Endorsed: United States Court of Customs Appeals. Filed May 4, 1923. Arthur B. Shelton, Clerk.

(9440)

15 In United States Court of Customs Appeals

Notice of motion to dismiss

SIRS: Please take notice that upon the annexed affidavit of Samuel M. Richardson, verified the 28th day of July, 1923, and upon the record herein, the undersigned will move this Court at a Term thereof to be held at the Court House, Washington, D. C. on the 2nd day of October, 1923, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order dismissing the appeal herein upon the ground that this Court has no jurisdiction to entertain the said appeal.

Dated, July 28th, 1923.

Yours, etc.,

(Signed) WM. W. HOPPIN,
Assistant Attorney General, Attorney for Appellee.

To

ARTHUR B. SHELTON, ESQ.
Clerk, United States Court of Customs Appeals.

ALLAN R. BROWN, ESQ.
Attorney for Appellants, 11 Broadway, New York City, N. Y.

Affidavit of Samuel M. Richardson, filed July 30, 1923

STATE OF NEW YORK,
City and County of New York, ss:

Samuel M. Richardson, being duly sworn, says that he is the Managing Attorney attached to the staff of William W. Hoppin, Assistant Attorney General in charge of customs matters.

That the appellant herein filed petitions under Section 489 of the Tariff Act of 1922 with the Board of United States General Appraisers for the remission of additional duties.

That the said Board rendered a decision denying the applications upon the law and the facts.

That this appeal was taken to review the decision of the Board of General Appraisers.

16 That deponent has made diligent search and has been unable to find any provision of law authorizing said appeal, and verily believes that this Court has no jurisdiction to entertain the same.

Wherefore deponent prays for an order dismissing the appeal herein.

(Signed) SAMUEL M. RICHARDSON.

Sworn to before me 28th day of July, 1923.

M. L. WALKER,
Notary Public.

[File endorsement omitted.]

In United States Court of Customs Appeals

Argument of Cause

March 18, 1924

Motion of appellee to dismiss said appeal, and said appeal on its merits, came on to be heard before the court and arguments of counsel thereon were commenced.

* * * * * * *

(Signed) GEO. E. MARTIN,
Presiding Judge.

In United States Court of Customs Appeals

Submission of notice to dismiss

March 19, 1924

17 [Title omitted.]

Motion of appellee to dismiss, and said appeal on its merits, came on to be heard before the court and arguments of counsel thereon were concluded and said motion to dismiss and said appeal were taken under advisement by the court.

* * * * * * *

(Signed) GEO. E. MARTIN,
Presiding Judge.

In United States Court of Customs Appeals

Certificate of importance

Filed March 25, 1924

[Title omitted.]

To the Honorable The Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the Court of Customs Appeals, I hereby certify that in my opinion the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said Act.

This 15th day of March, 1924.

(Signed) JAMES M. BECK,
Acting Attorney General.

[File endorsement omitted.]

18 United States Court of Customs Appeals

[Title omitted.]

Opinion June 28, 1924

BLAND, *Judge.*

This is an appeal from a decision of the Board of General Appraisers denying two petitions filed under section 489 of the tariff act of 1922 with relation to additional duties.

The petitions prayed for orders or findings of the board that the importer entered the merchandise at a less value than the final appraised value thereof without intent to defraud the revenues of the United States, or to conceal or misrepresent the facts, or to deceive the appraisers as to the value of the merchandise.

Section 489 of the tariff act of 1922 reads as follows:

"Sec. 489. Additional duties. * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the findings of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. * * *

19 "Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. * * *"

The importer purchased at Hong Kong the following quantities of plaited peacock flues at the following prices and on the following dates:

50 pounds at $26.00 per pound, July 9, 1922.
48 pounds at $28.00 per pound, July 27, 1922.
50 pounds at $28.00 per pound, Aug. 20, 1922.
36 pounds at $28.00 per pound, Aug. 30, 1922.
27 pounds at $32.00 per pound, Aug. 30, 1922.

The importations were entered at the customhouse by the importer's broker, and the entered value stated in the entries was the price paid for each lot of flues, which was also the invoice price. All of the goods were appraised at $32.00 per pound. Whereupon the importer filed petitions under section 489.

In support of the petitions, importers at the trial brought forward the importer Strauss who testified that peacock flues are small feathers on the sides of the stems of peacock feathers; that they are put through a machine or needle process in China; that he purchased the goods by cable; that he was not concerned with the market in

China except in the instances when he was trying to buy; that when he bought, he got quotations by cable, and that he made counter-offers; that the method of preparing these goods for the market has prevailed for the last two years, and that at times there is a big demand for them; that the market fluctuates, and during the last two years has fluctuated as much as fifty per cent; that the price on yesterday or two days ago would not necessarily be the price of the goods today; that he has been importing the goods for two
20 years, and that this was the first instance in which there had been an advance in value by the appraiser. He was not asked if he had made any entries other than the ones in question under the act of 1922. He stated he made the purchases on the dates and for the prices set out above, and when the goods arrived, he sent the papers to his customs brokers with no instructions, and that they entered the goods according to the consular invoices; that in doing so there was no intention on his part to mislead the appraiser; that he did nothing affirmatively or negatively intended to mislead the appraiser; that he did not concern himself about the market value at the time; that in making the entry at the price he did, there was no intention on his part to defraud the revenues of the United States, and that he gave the broker the invoice and told him to make the entry, and that in so doing he did not intend to deceive the appraiser; that during the past two years peacock flues have been a common commodity; that the shipment was by parcel post, and the entries were approximately of the same date, November 9 and 11; that the invoice dated at Hong Kong, September 26, has all the prices on it; that the broker did not make the entry in his own name, but did prepare the papers; that he had been importing since 1895; that he made no effort to ascertain what the value was on the date of exportation of the goods; that if he had made such effort, he would have been required to have cabled in every instance on every entry he made. This was all the evidence there was.

The Board of General Appraisers denied the petition apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent.

The Government in this court moved to dismiss the appeal on the ground that there was no statute giving the right to appeal.

Sections 195 and 198 of the Judicial Code, adopted March 3, 1911, read as follows:

"Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to re-
21 view by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable ques-

tions as to the laws and regulations governing the collection of the customs revenues; * * *

"Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *"

In *Brown & Co. et al* v. *United States* (12 Ct. Cust. Appls. ; T. D. 40026), an appeal was taken from the decision of the board dismissing the petition for an order under section 489, which decision held that the board was without jurisdiction to consider the petition. On appeal to this court, we held that the action of the board in dismissing the petition for re-hearing was a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and was an appealable question "as to the jurisdiction of said board," and also raised an appealable question as "to the laws and regulations governing the collection of customs revenues."

It may be contended that the Brown case, supra, deciding a question of the jurisdiction of the board, is not in point with the case at hand. We think otherwise. The action of the Board of General Appraisers upon the petition for an order for the remission of duties is, under the same sections of the Code, a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and such action on the part of the board also, as in the Brown case, raises an appealable question as to the laws and regulations governing the collection of customs revenues.

22 Under section 195, the Court of Customs Appeals is given exclusive appelate jurisdiction to review "final decisions by the Board of General Appraisers in all cases as to the construction of law and facts" * * * in "all appealable questions as to the laws and regulations governing the collection of customs revenues."

Section 198 provides that the importer may apply to the Court of Customs Appeals for a review of the construction of law and facts involved in a decision of the Board of General Appraisers or "any other appealable decision of the board."

It will be noted that in section 195 the words "final decisions" are used, and in section 198 the word "decision" is used. Under either section above referred to, this court is authorized to review the action of the board involved in this case. The action of the board denying the petition is a final decision; it is the end of the issue involved in the hearing in that case as far as the Board of

General Appraisers is concerned. The act of 1922 gives the board a new duty to perform, and in such duty they have exclusive original jurisdiction. Their action is not temporary or subject to change or modification by them; it is final and conclusive as between the parties. If the board in this case had decided that there was no intent to defraud the revenues etc., and had made an order or finding accordingly, could it have been contended that the order or finding was not final and was not a decision standing out independent of any other issue that might arise from the entry? It may be contended that the action of the board on petitions for remission like the one at hand is in the nature of an interlocutory order. Interlocutory means "Not final provisional, temporary." (Corpus Juris, 36, p. 268.)

"Interlocutory orders are not orders which finally settle the main issue in the case and dispose of the litigation. The final decision oft-times is in no way related to the interlocutory decision. An interlocutory decision is an incident of the case and only settles some intervening matter related to the main case." (Corpus Juris, Ibid, and cases cited.)

What issue could the board have in hand in this case to which their action on the petition would be interlocutory? If there had been no appeal, the collector would have liquidated the entry, and as far as the Board of General Appraisers was concerned,
23 the whole matter would have been ended. The motion of the Government to dismiss the appeal of appellant is overruled.

Appellant assigns as error of law and fact the failure of the board to find that the entry of the merchandise by the importer at a less value than that returned upon final appraisement was without any intention to defraud the revenues of the United States or conceal or misrepresent the facts of the case or deceive the appraiser as to the valuation of the merchandise. We think this assignment of error squarely presents the question as to whether upon appeal this court is authorized to review the evidence in the hearing before the board. For the reasons heretofore assigned in connection with the Government's motion to dismiss the appeal, and in conformity with the sections of the statute heretofore quoted, we think it is our duty to review the evidence introduced before the board.

It is contended that such review must be only as to such matters of evidence as would amount to questions of law. In other words, it is contended that if there is any evidence to support the finding of the board that this court cannot disturb its finding, and that if there was no evidence to sustain its finding, we would be justified (assuming we have the right to review) in disturbing the finding of the board purely as a matter of law.

In the early history of the court, in a very well considered case, Presiding Judge Montgomery rendering the decision of the court clearly stated the rule applicable to this issue. In *United States* v.

Riobe (1 Ct. Cust. Appls. 19; T. D. 30776), on a question of classification and the question as to whether this court has the power to review questions of fact, the court decided that it did have the right to review the facts, and furthermore, applied the rule in the trial of equity cases rather than the law rule. They were there construing section 198, which is now before us, and used the following language:

"A careful reading of this statute satisfies us that it was the intent of Congress that this court should have the power to review questions of fact. The circumstances that all the evidence before the board is competent evidence and that all is required to be returned to this court indicates that such was the intent.

23½ "We think the proper practice is analogous to that which obtains on appeals in equity cases in the State or Federal courts. That rule has been stated in various ways in the different courts, but the courts all recognize the better opportunities of a trial court to judge of the credibility of witnesses, and hesitate for this reason to disturb the conclusion except in a case where the evidence is clearly inconsistent with the conclusion reached by the trial court. The rule as stated in the *Blankensteyn case* (56 Fed. 474) is as follows:

"'The circuit court should not undertake to disturb the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board. But when the finding of fact is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence, it is the duty of the circuit court to disregard it.'

"We think this a fair and correct statement of the rule which should govern us under the organic statute above quoted.

"This leads us to the inquiry as to whether the conclusion of the board in this case is clearly against the weight of evidence. We have not been able to satisfy ourselves that the Government has presented such a case." (p. 20.)

The rule of law that if there is any evidence to support the finding of the trial tribunal that it cannot be disturbed on review is not applicable to the review by this court of proceedings before the board on petitions filed under paragraph 489 of the act of 1922, but the rule in the trial of equity cases, as laid down by this court in the Reibe case, supra, must be applied.

A casual reading of section 489 might lead to the hasty conclusion that the words "upon petition filed and supported by satisfactory evidence under such rules as the board may prescribe" left action upon the petition to the arbitrary discretion of the board, and that "satisfactory evidence" might mean *satisfactory to the board*. This was not the intention of Congress, and the courts have not so construed similar provisions.

In *United States* v. *Lee Huen* (118 Fed. 442) the court was construing the following provision from the statutes:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States,"

and the court there said:

"In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted
24 as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached, and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied."

The court quoted Stephens' Digest and Greenleaf on Evidence, as defining "satisfactory evidence," as follows:

"Satisfactory or sufficient evidence: That amount or weight of evidence which is adapted to convince a reasonable mind." (Steph. Dig. Ev. 2d Ed. p. 3, note 2.)

"By 'satisfactory evidence,' which is sometimes called 'sufficient evidence,' is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." (1 Greenleaf, Evidence, Sec. 2.)

Observing the above meaning of the word "satisfactory," the board had the right to determine whether the evidence introduced by the importer was "satisfactory," and this court on appeal guided by the principles heretofore set out must pass upon the question as to whether the finding of the board that the evidence was *not satisfactory* was correct.

In passing upon this question we think it is proper to have in mind that in tariff laws preceding the act of 1922, there was no provision for remission of additional duties except for manifest clerical error. By imposing additional duties for undervaluation, Congress sought to prevent an undervaluation which might lead to defrauding the customs revenues or to concealing or misrepresenting the facts

of the case, or to deceiving the appraiser as to the valuation of the merchandise. The act of 1922 recognizing that there were instances of undervaluation which were free from taint of fraud or ulterior motive, liberalized the law under which importers could obtain remission of additional duties. It however put upon the im-
25 porter the burden of showing by satisfactory evidence affirmatively that in entering his merchandise at a price lower than the appraised value that he did not intend the things the Government had sought to prevent in the enactment of the additional duties provisions.

While there may be no legal presumption of fraud or intent to deceive etc., in the fact that additional duties have been levied or that an undervaluation had been made, Congress, recognizing the possibility and even the probability of the existence of such conditions, placed the burden upon the importer to show affirmatively that such did not exist. The witnesses with whom the importer must make this showing are before the board and on questions of intent to defraud and deceive, the appearance of the witness, his conduct and manner of giving evidence must necessarily be given great weight by the board in determining the honesty and sincerity of the importer. It might have been well for Congress to have left the matter entirely to the discretion of the board, or to have prescribed that in reviewing facts the rule of law and not the rule in the trial of equity cases should be applied in appeals to this court. This court can not supply legislation, and under the rule in the trial of equity cases, we must review the evidence with the view of determining as to whether it was "satisfactory." For the reasons heretofore set out, this court will be slow to disturb the finding of the board on the weight of the evidence on petitions under this section of the statute. Their better opportunity for weighing the evidence properly before them in this particular jurisdiction where fraud, concealment and decit are involved, is recognized by this court, and when reviewing the facts upon which their decision is based, will be given great weight. (*Creamer* v. *Bivert* 214 No. 473; 113 J. W. 1118.)

In the present case however, as above observed, we find that the Board of General Appraisers denied the petition of the importer apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent. The opinion below closes with the following
statement: "The most that can be said about the importer
26 was that he was very careless. Sometimes neglect is as bad in law as acts of commission."

We need not here discuss the question raised by the fact that the importer failed to call as a witness the broker who made the entry, for we are satisfied that the judgment of the board must be reversed upon the ground that apparently the importer was denied a remission of the additional duties chiefly if not entirely upon the ground that he was very careless in the transaction relating to the making

of the entry. As we have stated above the burden rested upon the importer to establish by satisfactory evidence that his action was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the importer in any such case establishes these facts as aforesaid he becomes entitled thereby to the findings of the board in his favor as prescribed by the statute, and he would not forfeit that right because of mere carelessness alone upon his part in the transaction.

In the present case, if we construe the board's opinion correctly, the importer's petition was denied upon the ground that if the importer was not guilty of fraud he was at least very careless. We do not regard this finding as an answer to the issue raised by the importer's petition, or as a sufficient ground for its denial, accordingly we reverse the board's judgment and remand the case for a new trial.

Reversed.

27 In United States Court of Customs Appeals

[Title omitted.]

Dissenting opinion

SMITH, *Judge*, dissenting from the denial of the motion to dismiss and concurring in the conclusion reached on the merits.

I am sorry but I must dissent from that part of Judge Bland's decision which denies the Government's motion to dismiss the importer's appeal.

Sections 195 and 198 of the Judicial Code give to this Court the right to review only such *final* decisions of the law and the facts respecting *the classification* of imported merchandise and *the rate of duty* imposed thereon and the fees and charges connected therewith and all appealable questions as to the *jurisdiction* of said Board and all appealable questions as to the laws and regulations governing the enforcement and collection of customs revenues.

In this case no question is raised as to the classification of the merchandise or as to the rate of duty imposed thereon or to the fees or charges exacted by the collector or as to the jurisdiction of the Board to hear and determine the importer's petition. Neither is there any *final* decision or judgment as to the laws and regulations governing the collection of the customs revenues. Indeed, no such decision was possible until after liquidation of the entry and as yet no such liquidation has been made.

The finding provided for in section 489 is purely preliminary and interlocutory and is not a final decision or judgment inasmuch
28 as it does not finally determine or purport to finally determine the rights of the parts.

In the case of *Brown & Co.* v. *United States* (12 Ct. Cust. Appls., ——; T. D. 40026, the Board of General Appraisers held that it was without jurisdiction to entertain the petition provided for in paragraph 489 and ordered its dismissal. From that order

an appeal was taken to this Court and that appeal we refused to dismiss on the ground that the decision of the Board raised an appealable question as to the *jurisdiction* of said Board and an appealable question as to the laws and regulations governing the collection of customs revenues. In this case no appealable question as to the jurisdiction of the Board or as to the laws and regulations has been raised or can be raised until the Board is called upon to finally decide the rights of the parties.

In my opinion Congress vested the Board of General Appraisers with exclusive and final authority to hear the petition and make the finding provided for by section 489. As I see it, its finding is just as binding and conclusive on us as was that of the Secretary of the Treasury as to remission of additional duties under the law as it existed prior to the passage of section 489. But if the Board of General Appraisers be not the final arbiter in the matter, its finding is not a final decision or judgment and any error committed by the Board must be reached by way of protest against the final liquidation. To hold otherwise simply means the postponement of liquidation for a period of eight months or a year and useless delays in the transaction of customs business. I cannot think that Congress intended any such result as that and that if it had, it would have expressly given the right of appeal, just as it did in appraisement cases.

I concur in the conclusion reached on the merits of the case.

29 In United States Court of Customs Appeals

Judgment June 28, 1924

[Title omitted.]

Said appeal, together with motion of appellee to dismiss the same, having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that motion of appellee to dismiss said appeal be, and the same is hereby, denied.

It is—

Further ordered that the judgment of the Board of United States General Appraisers be, and the same is hereby, reversed, and said appeal is remanded to said Board for a new trial in conformity with the opinion of the court herein.

* * * * * * *

(Signed) JAMES F. SMITH,
Acting Presiding Judge.

In United States Court of Customs Appeals

[Title omitted.]

Certificate re mandate of Court of Customs Appeals

The final mandate in the above entitled appeal, consisting of a certified copy of the order of the Court of the 28th day of June, 1924,

was issued to the Board of United States General Appraisers on the 29th day of July, 1924.

ARTHUR B. SHELTON,
Clerk.

30 In United States Court of Customs Appeals

[Title omitted.]

Clerk's certificate

I, Arthur B. Shelton, Clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages, numbered 1 to 29, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court, this 29th day of August, A. D. 1924.

[SEAL] ARTHUR B. SHELTON,
Clerk.

31 Supreme Court of the United States

Order granting petition for certiorari filed Oct. 27, 1924

On petition for writ of certiorari to the United States Court of Customs Appeals.

On consideration of the petition for a writ of certiorari herein to the United States Court of Customs Appeals, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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